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Nos. 93-70 & 93-108

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In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON, RESPONDENTS

COLUMBIA RESOURCE COMPANY, L.P., PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON, RESPONDENT

On Writ Of Certiorari To
The Supreme Court Of The State of Oregon

Brief for Petitioners Oregon Waste Systems, Inc., and Gilliam County, Oregon

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QUESTION PRESENTED

Whether the fact that a state fee is calculated by reference to the costs assertedly incurred by the State in regulating the taxpayer is sufficient — standing alone — to immunize the fee against Commerce Clause scrutiny, even when, as in this case, the fee taxes only interstate commerce and fails the test for discriminatory state exactions set forth in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992).

II

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Oregon Waste Systems, Inc., states that its parent corporation is Waste Management, Inc., and that Waste Management, Inc.'s parent corporation is WMX Technologies, Inc. Oregon Waste Systems has no subsidiaries.

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V.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
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NO. 93-108

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and Gilliam County, Oregon

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon (Pet. App. 1a-19a)[1] is reported at 316 Or. 99 and 849 P.2d 500. The opinion of the Oregon Court of Appeals (Pet. App. 20a-44a) is reported at 114 Or. App. 369 and 837 P.2d 965.

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[1] All citations to "Pet. App." refer to the appendix to the petition in No. 93-70.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon (Pet. App. 45a-46a) was entered on June 9, 1993. The petition for a writ of certiorari was filed on July 14, 1993, and was granted on September 28, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 459.297 and 459.298 of the Oregon Revised Statutes (1991) and the pertinent parts of Oregon Administrative Rules 340-97-110 and 340-97-120 (formerly 340-61-115 and 340-61-120, respectively) are reprinted at pages 47a-49a of the appendix to the certiorari petition.

STATEMENT

In *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992), this Court held invalid under the Commerce Clause an Alabama statute that taxed the disposal of waste generated outside the State but did not tax the disposal of Alabama-generated waste. The law at issue here is indistinguishable from the discriminatory measure declared unconstitutional in that case. Oregon has levied a tax that discriminates expressly — and solely — on the basis of state of origin: disposal of interstate waste is taxed while disposal of Oregon-generated waste is not.

Amazingly, the Oregon Supreme Court held the Oregon tax lawful under the Commerce Clause. The state court concluded that the measure did not have to satisfy the Commerce Clause standard generally applicable to discriminatory taxes and regulations because the tax is calculated by reference to the costs to the State from disposal of the waste. That legal conclusion is plainly incorrect. This Court should close the loophole in the Commerce Clause created by the court below.

A. Background

Disposal of solid waste — a category of waste that generally includes all refuse that is not hazardous[2] — is regulated both by the federal government and by the States. Federal law fixes certain minimum standards for disposal facilities (see, *e.g.*, 42 U.S.C. §§ 6944 & 6945) and requires the preparation of state waste management plans (*id.* §§ 6942, 6943 & 6947), but otherwise leaves to the States the supervision of solid waste disposal.

Oregon comprehensively regulates the disposal of solid waste within the State. For example, a state permit is required in order to operate a solid waste disposal site (Or.

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[2] Under Oregon law,

> "[s]olid waste" means all putrescible and nonputrescible wastes, including but not limited to garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction wastes; discarded or abandoned vehicles or parts thereof; discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals, infectious waste * * * and other wastes; but the term does not include:
>
> (a) Hazardous wastes as defined in ORS 466.005.
>
> (b) Materials used for fertilizer or for other productive purposes or which are salvageable as such materials are used on land in agricultural operations and the growing or harvesting of crops and the raising of animals.

Or. Rev. Stat. § 459.005(27) (1991). See also 42 U.S.C. § 6903(27) (substantially similar definition).

Rev. Stat. § 459.205 (1991)); the site must be operated in accordance with the governing laws and regulations and the terms specified in the permit (*ibid.*; *id.* § 459.376); the types of materials that may be disposed of at such a facility are limited by state law (*id.* § 459.247); and when disposal operations are concluded at a site, the owner must close the site and maintain it in accordance with specified standards (*id.* §§ 459.268 & 459.270). These statutory provisions are supplemented by a large body of regulations. See Or. Admin. R. Chapter 340, Divisions 93-97.

Oregon levies a number of different fees in connection with its regulation of solid waste disposal. These include:

- a permit application fee that "shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit" (Or. Rev. Stat. § 459.235(2) (1991)), which ranges from $100 to $10,000 for solid waste disposal (Or. Admin. R. 340-97-120(2));
- an annual fee, for the purpose of implementing the permit compliance program and other statutory requirements, to be "based on the amount of solid waste received at the disposal site in the previous calendar year" (Or. Rev. Stat. § 459.235(3) (1991)), which is fixed at $.21 per ton for landfills (Or. Admin. R. 340-97-120(3));
- an annual fee for the purpose of financing recycling programs, set at $.09 per ton (Or. Admin. R. 340-97-120(4)); and
- an annual fee, to be used for removal or remediation of hazardous substances at certain solid waste disposal sites (Or. Rev. Stat. § 459.236 (1991)), which is set at $.13 per ton (Or. Admin. R. 340-97-120(5)(d)).

The county in which a disposal site is located also may impose a fee, the proceeds of which may be used for a variety of purposes, including mitigation of any adverse effects on the environment. The amount of the fee may be agreed upon between the county and the site operator; in the absence of an agreement, the statute provides for a formula based upon the number of tons of waste disposed of at the site. Or. Rev. Stat. § 459.310 (1991).

This case involves an additional fee on waste disposal levied by the Oregon Legislature in 1989. That provision, entitled "[s]urcharge on solid waste generated out-of-state," is expressly limited to "person[s] who dispose[] of solid waste generated out-of-state." Or. Rev. Stat. § 459.297 (1991). A companion provision directs the Environmental Quality Commission to fix the amount of the fee by regulation on the basis of "the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state" other than costs recovered under various other Oregon laws. *Id.* § 459.298.[3] This fee is "in addition to any other fee charged for disposal of solid waste at the site." *Id.* § 459.297. No Oregon statute requires that an equivalent fee be levied on waste generated within the State.

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[3] The costs "may include but need not be limited to costs incurred for:

(1) Solid waste management;
(2) Issuing new and renewal permits for solid waste disposal sites;
(3) Environmental monitoring;
(4) Ground water monitoring; and
(5) Site closure and post-closure activities."

Or. Rev. Stat. § 459.298 (1991).

Following the enactment of the statute, the Environmental Quality Commission instituted an administrative proceeding to fix the amount of the fee on disposal of out-of-state waste. It established $2.25 per ton as the additional fee for waste generated out-of-state. Or. Admin. R. 340-97-120(7) (formerly 340-61-120(6)).[4]

At the same time that it enacted the additional fee on disposal of out-of-state waste, the Oregon Legislature levied an additional fee on disposal of solid waste generated within the State to raise revenues to support environmental protection programs, solid waste planning, and recycling. See 1989 Or. Laws 833, §§ 152 & 153. The fee on Oregon waste, however, was capped at $.50 per ton (later increased to $.85 per ton). Or. Rev. Stat. §§ 459A.110(5) & 459A.115 (1991). The latter amount is 36% of the additional $2.25 per ton imposed on disposal of non-Oregon waste.[5]

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[4] The Commission initially adopted a fee of $2.75 per ton, but that regulation was disapproved by the state Emergency Board. See Or. Rev. Stat. § 459.298 (1991) (requiring Emergency Board approval during the interim between sessions of the rule promulgated by the Commission).

[5] Apparently concerned that the invalidation by the courts of the $2.25 per ton fee would create a situation in which only Oregon waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to subject out-of-state waste to the same $.85 per ton charge as Oregon waste. See Or. Rev. Stat. § 459A.110(6) (1991) (as amended by 1991 Or. Laws 385, § 13a). (This fee was added to the $2.25 fee, which was left in place by the Legislature.) If the $2.25 per ton fee ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to Oregon waste. 1991 Or. Laws 385, §§ 91 & 92. Thus, the ultimate result would be the same as under the original 1989 law — the surcharge for Oregon waste would be $.85 per ton, while the surcharge for out-of-state waste would be $2.25 per ton.

B. The Decisions Below

Petitioner Oregon Waste Systems, Inc. ("OWS") owns and operates a solid waste landfill southwest of the City of Arlington in Gilliam County, Oregon. Both solid waste generated within Oregon and solid waste generated outside the State are disposed of at this landfill. Petitioner Gilliam County receives direct and indirect benefits from the operation of the landfill, both in terms of employment of county residents and the payment to the county of local fees and taxes.

Following the Environmental Quality Commission's issuance of the rule fixing the disposal fee at $2.25 per ton, petitioners sought judicial review of the rule in the Oregon Court of Appeals. See Or. Rev. Stat. § 183.400 (1991) (providing for judicial review of administrative rules). Petitioners challenged the rule under state law and also on the ground that the rule violated the Commerce Clause of the United States Constitution.

The state court of appeals rejected the constitutional challenge. Pet. App. 43a-44a. The court characterized the Oregon exaction as a "compensatory fee" (*id.* at 39a) because it is "based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed" (*id.* at 41a n.19). Cautioning that cases addressing Commerce Clause challenges to "discriminatory health and general welfare laws and general revenue measures" did not provide the controlling standard (*id.* at 40a n.19), the court stated that such a fee is invalid under the Commerce Clause only if it "is excessive for the purpose for which it is collected" or if "'there is no sufficient relation between the measure employed and the extent or manner of use' of the state provided service" (*id.* at 40a (citation omitted)). The court concluded that OWS had failed to establish that the fee on disposal of out-of-state waste was

either excessive or unrelated to the state provided services (*id.* at 44a), and accordingly upheld the fee.[6]

The state supreme court affirmed. Pet. App. 1a-19a. It stated that "[b]ecause of the express nexus to actual costs incurred, * * * [the fee on out-of-state waste] does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state." *Id.* at 17a. The court further stated that the fee "constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste. A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable." *Id.* at 18a (citations omitted). The sole inquiry under the Commerce Clause, the court said, is whether the amount of the fee is "'manifestly disproportionate to the services rendered.'" *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

SUMMARY OF ARGUMENT

Less than eighteen months ago, this Court invalidated Alabama's discriminatory fee on disposal of waste generated outside the State. *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992). The Oregon fee at issue here is essentially indistinguishable from the measure struck down in *Chemical Waste Management*. The Alabama statute taxed disposal of interstate waste but not disposal of intrastate waste; the Oregon measure is drawn in precisely the same

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[6] The court observed that the statute governing the judicial review proceeding provided that the reviewing court could examine only the rule under review, the statutory provisions authorizing the rule, and certain rulemaking documents. Pet. App. 44a (quoting Or. Rev. Stat. § 183.400(3)). The court stated that "[a] facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service." Pet. App. 44a.

manner. Alabama's discriminatory tax was not tied to any differences in the health, safety or financial burdens imposed upon the State by intrastate and interstate waste; the Oregon statute by its terms directs the State to tax only interstate waste even though the costs that Oregon seeks to recover are triggered by the disposal of intrastate waste as well.

In fact, there is only one difference between the two measures — the Oregon fee purports to be cost justified while the Alabama tax did not. The Oregon Supreme Court imbued that difference with tremendous constitutional significance, holding that cost-based exactions may be upheld under the Commerce Clause even when they violate the anti-discrimination principle applicable to other types of state revenue measures. That holding is clearly wrong.

This Court has repeatedly reaffirmed that a cost-based fee will pass constitutional muster only if it is not "discriminatory against interstate commerce." *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716 (1972). Indeed, nearly 100 years ago the Court expressly rejected the argument that state fees set by reference to costs may discriminate against interstate commerce. *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880).

Moreover, once the proper constitutional standard is applied, there can be no doubt that, far from qualifying as nondiscriminatory as the court below indicated, the Oregon fee discriminates against interstate commerce in violation of the Commerce Clause. The fee certainly serves a legitimate state purpose — cost recovery — but as this Court has recognized in numerous decisions, most recently in *Chemical Waste Management*, a legitimate purpose is not by itself sufficient to justify discrimination. The State must establish that its purpose could not be achieved by nondiscriminatory means.

Here, where Oregon seeks to recover costs that are associated with disposal of all waste, regardless of origin,

there clearly is a nondiscriminatory alternative: "a generally applicable per-ton additional fee on *all* * * * waste disposed of within [Oregon]." *Chemical Waste Management*, 112 S. Ct. at 2015 (emphasis in original). Oregon's decision to choose the *most* discriminatory alternative clearly violates the Commerce Clause.

ARGUMENT

OREGON'S $2.25 PER-TON FEE ON DISPOSAL OF OUT-OF-STATE WASTE VIOLATES THE COMMERCE CLAUSE

The Oregon Supreme Court's principal justification for upholding the State's tax on disposal of out-of-state waste was its conclusion that all cost-based fees are *per se* constitutional under the Commerce Clause, without regard to whether the fee discriminates against interstate commerce. The state court also indicated that a cost-based fee is properly classified as nondiscriminatory, and therefore valid under the Commerce Clause, because the amount of the fee is fixed by reference to a factor other than the waste's state of origin. Both of these rationales are fundamentally flawed. Cost-based fees — like any other state exaction — are lawful only if they are nondiscriminatory. And this Court's decision in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992), establishes beyond any doubt the plainly discriminatory nature, and patent unconstitutionality, of the Oregon fee.

A. The Commerce Clause Prohibits All State Exactions That Discriminate Against Interstate Commerce, Including Fees That Purport To Be Cost Justified.

1. This Court's Decisions Make Clear That A Cost-Justified Fee Is Unconstitutional If It Discriminates Against Interstate Commerce.

The Court repeatedly has affirmed that "'a State may not tax a transaction or incident more heavily when it crosses

state lines than when it occurs entirely within the State.' Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)) (citations omitted). This principle has been applied most often to state regulations and state taxes designed to raise revenues for general purposes. But this Court's decisions leave no doubt that the same rule applies to all types of state financial exactions, including user fees charged by the State for the use of state-provided facilities or services.[7]

Indeed, the Court applied this very principle over 100 years ago to invalidate a discriminatory state exaction. *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880), was a challenge to a city ordinance that imposed wharfage fees for unloading non-Maryland merchandise on the city's public wharves; Maryland goods were exempt from the fees. The city argued that "those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property." 100 U.S. at 441. Declaring that proposition "unsound both upon

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[7] The Court has described "user fees" or "user taxes" as those exactions "designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621 (1981). The Oregon fee does not fit this model precisely, because the "costs" that the state seeks to recover are incurred in connection with regulatory oversight, not as a result of the taxpayer's use of state facilities. (In addition, as we discuss below (at 28-29), some elements of the fee are not even costs at all.) But even assuming that the Oregon tax qualifies as a user fee, it violates the Commerce Clause because it discriminates against interstate commerce.

principle and authority," this Court held that the fees violated the Commerce Clause because they imposed a discriminatory burden on interstate commerce. *Id.* at 442-443.

The Court has continued to adhere to the view that user fees are unconstitutional if they discriminate against interstate commerce. In *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court considered a Commerce Clause challenge to a $1 per person "use and service charge" for passengers enplaning from the Evansville airport; the fee was designed to recover the costs to the Authority of constructing and maintaining the airport (405 U.S. at 709). The Court held that "so long as the [user fee] is based on some fair approximation of use or privilege for use [of governmental resources] * * * *and is neither discriminatory against interstate commerce* nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster." *Id.* at 716-717 (emphasis added).

The Court in that case first inquired whether the fee "discriminate[d] against interstate commerce and travel." *Id.* at 717. Observing that "both interstate and intrastate flights are subject to the same charges," and that there was "no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other," the Court held the fee nondiscriminatory. *Ibid.*[8]

More recently, in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), the Court reaffirmed that user fees are valid under the Commerce Clause only if they are

[8] The Court then went on to apply the other parts of the test, examining whether the charge "reflect[s] a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed" (405 U.S. at 717) and whether the charge was "excessive in relation to costs incurred by the taxing authorities" (*id.* at 719).

both nondiscriminatory *and* represent a fair approximation of the use of the government facilities or services. 483 U.S. at 289-290. Pennsylvania argued in that case that the marker fee and axle tax there at issue could be upheld as constitutionally-permissible user fees. The Court squarely rejected that argument on the ground that the fees "discriminate[d] against out-of-state vehicles." *Id.* at 290. Cf. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261-262 (1974) (government may not require nonresident indigent individuals to bear costs of hospitalization while providing free services to residents); *Toomer* v. *Witsell*, 334 U.S. 385, 402-403 (1948) (Privileges and Immunities Clause prohibits State from charging discriminatory license fee to nonresidents).

Under this Court's cases, therefore, the threshold inquiry in evaluating the validity under the Commerce Clause of a cost-justified fee is the same as the test that applies to any other state regulation or financial exaction: whether the measure discriminates impermissibly against interstate commerce.

The Oregon Supreme Court concluded in the present case that a State is free to "impos[e] a compensatory fee for costs incurred * * * in supervising and regulating the activities of an entity engaged in interstate commerce" while exempting entities engaged in intrastate commerce from paying the cost of precisely the same supervisory and regulatory activities. Pet. App. 18a. In the Oregon court's view, the existence of discrimination against interstate commerce is irrelevant. All that need be considered to determine the validity of a user fee under the Commerce Clause is whether the amount of the fee is "'manifestly disproportionate to the services rendered.'" *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

As we have discussed, however, there simply is no support in this Court's decisions for the startling proposition

that undergirds the decision below — that once a court determines that the state levy at issue is a user fee, the anti-discrimination element of the Commerce Clause is no longer in issue and the fee will pass muster under the Commerce Clause regardless of the extent of the discriminatory burden imposed upon interstate commerce. Far from holding that a user fee should not be scrutinized to determine whether it discriminates against interstate commerce, this Court's decisions expressly state that such fees must be examined on an individual basis to determine whether they comport with the anti-discrimination obligation imposed by the Commerce Clause. Accord *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993) (holding that this Court's decisions forbid cost-based fees that discriminate against interstate commerce).[9]

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[9] None of the cases relied upon by the Oregon Supreme Court hold that a user fee may pass muster under the Commerce Clause even if it discriminates against interstate commerce. The statute at issue in *Clark* v. *Paul Gray, Inc.*, *supra*, required individuals to obtain a license, and pay a license fee, in order to transport motor vehicles for the purpose of offering them for sale. The statute exempted some, but not all, intrastate transportation from the license requirement. The Court considered and rejected the claim that the statute discriminated against interstate commerce, holding that the taxpayer lacked standing to challenge one of the exemptions (306 U.S. at 596) and that the other exemption involved transportation that differed in character — and therefore in the burden imposed on state resources — from the transportation that was subject to the fee (*id.* at 596-598). By evaluating the claim of unjustified discrimination on the merits, and rejecting it only because the statutory classification was justified by a factor other than the in-state destination of the exempt traffic, *Clark* makes clear that user fees may be upheld only if they are *non*discriminatory.

In *Great Northern Ry.* v. *Washington*, 300 U.S. 154 (1937), there was no claim of discrimination. The statute in question levied an identical fee on all public utilities, those engaged in intrastate commerce and those engaged in interstate commerce; the Court held that the State failed to carry its burden of showing that the fees did not exceed what was reasonably necessary to cover the cost of its regulatory and supervisory activities (300 U.S. at 168). See also *Ingels* v. *Morf*, 300 U.S. 290 (1937) (fee struck down on ground it lacked reasonable relation to costs of regulation; Court did not reach discrimination claim). Finally, *Commonwealth Edison Co.* v. *Montana*, *supra*, involved a general revenue tax, not a user fee, and the Court expressly "put to one side" its decisions addressing user fees. 453 U.S. at 621. Moreover, the Court upheld the tax in that case because it did *not* discriminate against interstate commerce.

2. Nothing In The Purposes Of The Commerce Clause Justifies Applying A Truncated Constitutional Analysis To State User Fees.

The Oregon court provided no reason why user fees — unlike every other form of governmental charge and regulation — should be exempt from the fundamental anti-discrimination principle embodied in the Commerce Clause. In fact, the purposes underlying the Commerce Clause weigh strongly against the user fee exception created by the court below.

To begin with, the fact that a tax is calibrated by reference to costs assertedly incurred by a State does not by itself guarantee that the exaction will be nondiscriminatory. Here, for example, the fee is levied *only* on interstate commerce despite the fact that intrastate commerce subjects the state to virtually all of the same costs — a blatant example of discrimination. See pages 20, 27-28, *infra*.

Moreover, discriminatory user fees would impose the same barriers against interstate trade as other types of discriminatory measures, and can fuel the very sort of commercial rivalries among the States that the Commerce Clause was designed to prevent. See *McLeod* v. *J.E.*

Dilworth Co., 322 U.S. 327, 330 (1944) (the "very purpose" of the Commerce Clause was to establish "an area of free trade" among the States by forbidding discriminatory treatment of each other's products and trade); *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979). The legal regime created by the court below would allow exactions that closely approximate import tariffs. For example, highway tolls could be assessed only on interstate commerce. A State that required inspection of meat and produce before it could be sold could impose the full cost of inspection on out-of-state goods while levying no fee at all for performing the same inspections of in-state products. These are precisely the types of divisive exactions — pitting products of one State against those of another — that the Commerce Clause was intended to prevent.

Permitting such a significant difference in the Commerce Clause standards applicable to general taxes and user fees also would give States a tremendous incentive to characterize as many exactions as possible as "user fees" in order to avoid the prohibition against discriminatory measures. This Court has long recognized that States have an inherent incentive to shift costs to out-of-state taxpayers. See, *e.g.*, *Nippert* v. *City of Richmond*, 327 U.S. 416, 434-435 (1946) (in invalidating a discriminatory tax, the Court observed that "[p]rovincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation"). Although the political process does provide a check against disproportionate *nondiscriminatory* fees, because such fees are borne by intrastate as well as interstate commerce, the political process provides little or no protection against disproportionate *discriminatory* fees because the parties burdened by such fees are not represented. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) ("to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally

exerted on legislation where it affects adversely interests within the state").

States could seek to recover extremely amorphous "costs" allegedly inflicted by interstate commerce without imposing the same burden on intrastate commerce. These could range from compensation for risks of harm to persons or the environment posed by out-of-state goods (potentially burdening everything from hazardous chemicals used in manufacturing, to guns and ammunition, to kitchen knives); to imposing on particular out-of-state goods a pro rata share of police, fire, and other state services; to requiring compensation for damage to a state's image from the presence of unpopular out-of-state products. Courts would be able to invalidate a fee limited to interstate commerce only if the fee was manifestly disproportionate to the State's costs, a test that leaves considerable leeway for the imposition of heavy — and disproportionate — burdens on interstate commerce.

There simply is no reason to create two different tiers of Commerce Clause protection, with all the possibilities of subtle (and not-so-subtle) evasion of the anti-discrimination principle. Any type of state enactment that expressly discriminates against interstate commerce — be it a regulation, tax, or user fee — must satisfy the *Chemical Waste Management* standard in order to pass muster under the Commerce Clause.[10]

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[10] Indeed, rather than holding that user fees are subject to more relaxed Commerce Clause review, as the court below stated, this Court has subjected such fees to more searching review in one respect — "[b]ecause such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, [the Court] ha[s] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered.'" *Commonwealth Edison*, 453 U.S. at 622 n.12 (citation omitted). The burden imposed upon taxpayers by general revenue taxes is

B. The Oregon Fee Is Unconstitutional On Its Face.

The test for determining whether a state exaction is unconstitutionally discriminatory was set out by this Court in *Chemical Waste Management* — if the state law "discriminates both on its face and in practical effect [against interstate commerce], the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management*, 112 S. Ct. at 2014 (quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)).

The Oregon Supreme Court did not undertake that inquiry. It observed that a user fee's "express nexus to actual costs incurred" provides a "discernible basis" for the fee separate from the out-of-state origin of the waste (Pet. App. 17a). But the fact that a user fee may serve a legitimate public purpose — cost recovery — falls far short of establishing that a discriminatory user fee satisfies the stringent Commerce Clause standard prescribed by this Court in *Chemical Waste Management*. See 112 S. Ct. at 2013 (listing cases in which "'a presumably legitimate goal was sought to be achieved by the illegitimate means'" of imposing a discriminatory burden on interstate commerce). The State must not only demonstrate a legitimate purpose but also must establish that the purpose could not be achieved by a less discriminatory means. In virtually every user fee case there will be other, nondiscriminatory means by which the State may accomplish its purpose of cost recovery, such as an across-the-board fee on both intrastate and interstate commerce.

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subject to much less searching judicial scrutiny. *Id.* at 625-629.

Had it applied the proper test, the Oregon Supreme Court would have invalidated the Oregon fee on the ground that the discriminatory exaction clearly violates the Commerce Clause's anti-discrimination principle.

1. The Oregon Fee Is Invalid Under The *Chemical Waste Management* Test.

The Oregon regulation, and the underlying statutory provisions, are constitutionally indistinguishable from the Alabama tax held unconstitutional by this Court in *Chemical Waste Management*. The Alabama law imposed a disposal tax only on interstate waste disposed of within the State. This Court held that Alabama bore the burden of justifying the discriminatory tax "'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" 112 S. Ct. at 2014 (citation omitted).

Alabama could not carry that burden. The Court found that Alabama failed to show that the tax on interstate waste was justified by higher costs or environmental risks associated with the disposal of that waste. Because these factors did not vary with the origin of the waste, but were the same for each ton of waste regardless of origin, the State could not single out interstate waste for a higher tax burden. 112 S. Ct. at 2014-2016. Less discriminatory alternatives were available, "not the least of which [is] a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama." *Id.* at 2015 (emphasis in original).

The Oregon regulation suffers from the same flaw. Interstate waste alone is targeted for an additional exaction, but — as was the case with the Alabama statute — neither the Oregon law nor the regulation links that additional burden to any unique characteristic of interstate waste, such as a higher per-ton cost to the State as compared to Oregon waste. Rather, the statute's very terms establish that the categories of costs that the State seeks to recover through the fee are the

kinds of costs that result from the disposal of all types of waste. See Or. Rev. Stat. § 459.298 (1991) (referring to costs incurred for solid waste management, issuing permits for disposal sites, environmental and ground water monitoring, and site closure activities). The State admitted as much in its brief below. Or. Sup. Ct. Br. 24-25.

Thus, each ton of interstate waste is assessed a fee calculated to reimburse the State for the entire cost of regulating disposal of that waste, but intrastate waste is exempt from that burden and instead is assessed a fee representing a significantly smaller share of the State's costs. (The additional fee applicable to Oregon waste is only 36% of the amount applicable to interstate waste. See page 6, *supra*.) The regulation subjects interstate commerce to a burden from which intrastate commerce is exempt: compensating the State for *all* of the costs associated with waste disposal.

As with the Alabama tax, such blatant discrimination violates the Commerce Clause. The face of the statute makes clear that the purpose of the fee is to recover the costs associated with regulating waste disposal. Yet Oregon has not pointed to any reason why it cannot recover all of its costs of regulation through a nondiscriminatory per-ton fee on all waste disposed of within the State. (Indeed, Oregon already uses nondiscriminatory fees to recover a wide variety of costs associated with its regulation of waste disposal. See pages 4-5, *supra*.) Because there plainly are less discriminatory means by which Oregon may accomplish its purpose, the fee on interstate waste violates the Commerce Clause.

2. Separate Proof Of "Economic Protectionism" Is Not Necessary To Establish The Fee's Discriminatory Character.

Oregon argued in the court below that the fee's facial discrimination against interstate commerce was not by itself

sufficient to establish the measure's unconstitutionality because "protectionist laws and *only* protectionist laws discriminate against interstate commerce. * * * A statute that does not provide an advantage to local interests at the expense of out-of-state interests does not discriminate against interstate commerce." Or. Sup. Ct. Br. 13 (emphasis in original). According to the State, proof that a state law imposes a discriminatory burden on interstate commerce is not sufficient to trigger the State's burden under the *Chemical Waste Management* standard to demonstrate that the law serves a state interest that could not be furthered through nondiscriminatory means. Rather, the record must demonstrate the actual competitive impact of the discriminatory burden. Oregon completely misapprehends the governing legal standard.

This Court has observed many times that the purpose of the Commerce Clause is to combat economic protectionism. But the Court has never held that proof of actual competitive injury is the only way to establish the invalidity of a particular state enactment under the Commerce Clause. Rather, the Court has recognized that the Commerce Clause is implicated by the imposition of a disproportionate economic burden on interstate commerce together with the State's inability to show that the measure is the least discriminatory means of effectuating the underlying state policy. *Chemical Waste Management*, 112 S. Ct. at 2015 n.6 ("[t]he 'virtually *per se* rule of invalidity' applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade'") (citations omitted).

In *Chemical Waste Management*, for example, the Court observed that the Alabama statute discriminated on its face against interstate commerce because it was "imposed on interstate commerce alone." 112 S. Ct. at 2014. "Because the [Alabama tax] discriminates," the State bore the burden

of showing the absence of nondiscriminatory alternatives. *Ibid.* The Court did not condition that legal conclusion upon proof that Alabama waste generators obtained an economic advantage over their counterparts in other states. Indeed, it did not even discuss that question. See also *id.* at 2015 n.6 (""'[a] finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect'") (citations omitted).

That approach is supported by simple common sense. Imposition of a disproportionate financial burden on interstate commerce necessarily disadvantages interstate commerce vis-a-vis intrastate commerce. See *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 48 (1990) (discriminatory tax injured the taxpayer engaged in interstate commerce "not only because it left [the taxpayer] poorer in an absolute sense than before * * *, but also because it placed [the taxpayer] at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products"); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 275 (1988). Unless the discrimination is justified by some reason other than state of origin, it plainly runs afoul of the purpose of the Commerce Clause — to ensure the free flow of interstate trade.

Even if such an analysis were necessary, moreover, the economic advantage afforded to Oregon waste generators (as compared to their out-of-state counterparts) is apparent from the face of the fee and its authorizing statute. Those entities do not have to absorb a cost that out-of-state waste generators *do* have to absorb. That, in turn, means that in-state generators will have an economic advantage in competing for Oregon waste disposal capacity. That economic advantage stems solely from the in-state origin of the waste and is therefore anathema to the Commerce Clause.

3. Oregon Cannot Justify The Discriminatory Fee On The Ground That Intrastate Commerce Pays Its "Fair Share" Of The Relevant Costs Through General Revenue Measures.

Oregon argued below that the fee on disposal out-of-state waste is not discriminatory because intrastate commerce pays its "fair share" of the same costs "through a combination of fees and general fund taxation" (Or. Sup. Ct. Br. 14 (footnote omitted)). That argument is squarely foreclosed by this Court's Commerce Clause jurisprudence.

The Court has recognized that in some situations a tax limited to interstate commerce may "compensate" for an exaction imposed solely on intrastate commerce and therefore may pass muster as nondiscriminatory. The Court has carefully delineated the boundaries of this "compensatory tax doctrine," however, in order to avoid undermining the Commerce Clause's prohibition against discrimination. A tax restricted to interstate commerce accordingly must satisfy two clear requirements before it may be upheld on this ground: the levy on interstate commerce must be equal to the parallel levy on intrastate commerce, and the two taxes must be applied to "substantially equivalent event[s]." *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981); see also *Tyler Pipe Industries* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 244 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. at 642-643.

Oregon did not even attempt to show that the fee met this test (see Or. Sup. Ct. Br. 14, 21). Nor could it. The State cannot point to a $2.25 per ton fee imposed on disposal of Oregon waste; that fee is only $0.85 per ton (see page 6, *supra*). And to the extent the State relies on other types of taxes to make up the difference, those exactions plainly are not imposed on events that are "substantially equivalent" to waste disposal.

Oregon instead argues for the creation of a "short cut" to avoid the restrictions on the compensatory tax doctrine. In Oregon's view, a fee on interstate commerce should be upheld as long as intrastate commerce somehow bears the same financial burden as interstate commerce — here, a "fair share" of the costs of waste disposal. Because the costs to the State of disposing of Oregon waste are funded out of general revenues, the argument goes, intrastate waste does bear an equal burden and the fee on disposal of interstate waste is effectively nondiscriminatory.

This argument is virtually identical to one rejected by the Court in *American Trucking Ass'ns, Inc.* v. *Scheiner*, *supra*. There, the State of Pennsylvania sought to justify taxes that imposed a disproportionate burden on out-of-state truckers by arguing that Pennsylvania truckers actually paid a higher rate if registration fees and other fees and taxes on Pennsylvania truckers were considered in the aggregate. The Court squarely rejected this argument:

> [E]ven if the relative amounts of the States' registration fees confer a competitive advantage on trucks based in other States, the Commerce Clause does not permit compensatory measures for the disparities that result from each State's choice of tax levels. To the extent that a competitive disadvantage is conferred on Pennsylvania carriers by the relative amounts of the States' registration fees, the remedy lies in a change in their level, * * * or the collection of revenues through valid taxes. * * * As one commentator has observed, "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens."

483 U.S. at 288-289 (citation omitted).

Oregon's attempt to justify the fee on interstate waste by pointing to other types of financial burdens imposed on intrastate commerce is foreclosed by *Scheiner*. Just as Pennsylvania could not agglomerate taxes and fees on intrastate commerce in an attempt to show that Pennsylvania truckers actually bore the same or a greater economic burden than out-of-state truckers, Oregon cannot generally invoke taxes paid by intrastate commerce in order to balance the fee on interstate waste.

But even on its own terms, Oregon's argument is indefensible. To begin with, the general revenue funds that assertedly cover the "costs" of disposing of intrastate waste are produced by a variety of levies, including personal income taxes, corporate excise and income taxes, and taxes on particular products such as liquor and cigarettes. See Or. Rev. Stat. tit. 29. These taxes obviously are not paid exclusively by Oregon waste generators; they are paid by a much larger — and entirely different — group of taxpayers. The Commerce Clause does not recognize two competing monoliths — "all interstate commerce" and "all intrastate commerce" and mandate equality between the sums of all of the tax burdens on the two. The critical question under the Commerce Clause is whether the State has imposed an economic burden on a particular segment of interstate commerce that is heavier than the burden on the parallel segment of intrastate commerce. Oregon's apparent view that intrastate commerce is one indivisible entity rests on the precise logic that the Commerce Clause rejects: that the State is an independent economic entity with all intrastate commerce treated as separate and apart from interstate commerce.

Moreover, the taxes on which Oregon relies do not even fall exclusively on intrastate commerce. For example, one source of these funds — the State's corporate excise and corporate income taxes (see Or. Rev. Stat. ch. 317 & 318) — apply equally to revenues generated by both intrastate and interstate transactions. Innumerable interstate transactions are

therefore burdened by these levies. Particularly significant is the fact that landfill operators such as Oregon Waste Systems must pay taxes on receipts from interstate transactions even though those transactions are also subject to the $2.25 per ton fee. And out-of-state waste generators must pay the same taxes with respect to income earned in Oregon even though their disposal costs will reflect the out-of-state fee.

Oregon's "fair share" argument is thus a mirage. Because the costs of disposal of intrastate waste are not covered by taxes paid solely by intrastate commerce — but instead are covered by taxes paid by *both* intrastate *and* interstate commerce — the result of Oregon's approach would be that interstate commerce would pay not just its own way, but some portion of intrastate commerce's way as well. Rather than establishing the nondiscriminatory nature of the fee, Oregon's argument merely provides yet another reason why the fee is discriminatory.

C. The Record Confirms The Unconstitutionality Of The Fee.

In our view, the unconstitutionality of the Oregon fee is plain from the face of the regulation and authorizing statute. There accordingly is no need to refer to the record in this case. To the extent the Court concludes otherwise, it is of course free to examine the record. The state procedural rules that barred the Oregon Supreme Court from doing so (see Pet. App. 5a n.2) do not bind this Court. And the record confirms the discriminatory nature of the fee.[11]

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[11] If the Court were to conclude that examination of the record is necessary to adjudicate the Commerce Clause discrimination claim but did not wish to undertake that review in the first instance, the Court could reverse the judgment of the Supreme Court of Oregon and remand the case with instructions that no disposition be made with respect to the discrimination claim, the course that the lower court followed with respect to the Commerce Clause excessiveness claim. See Pet. App. 11a. The discrimination issue could then be litigated in a subsequent proceeding not hedged with the procedural restrictions that bound the Oregon courts in this case.

The components of the $2.25 per ton fee are as follows:

$/ton	Basis for cost
$0.58	Statewide activities for reducing environmental risk and improving solid waste management.
$0.66	Reimbursement to the state for tax credits and other public subsidies for Oregon landfills.
$0.05	Solid waste reduction activities related to the review and certification of out-of-state communities' waste reduction and recycling plans.
$0.72	Increased environmental liability.
$0.20	Lost disposal capacity.
$0.03	Publicly supported infrastructure.
$0.01	Nuisance impacts from transportation.

R. 938-951 (hearing transcript).

To begin with, virtually *all* of these costs — to the extent they are costs at all — are triggered by the disposal of any ton of waste regardless of its origin; essentially no costs are unique to disposal of out-of-state waste.[12] The State's own

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[12] Even the $0.05 per ton for review of the recycling programs of out-of-state communities that ship waste to Oregon simply parallels the cost of the state-mandated review of the recycling programs of Oregon communities whose waste is disposed of

calculations establish that fact: in each case, the costs were calculated on a per ton basis without distinguishing between Oregon and interstate waste. The resulting per ton cost was then assigned to interstate waste. R. 665-690 (DEQ analysis). The State's economic consultant expressly recognized that the costs in question were common to all waste. R. 731-732, 744. There is no record evidence to the contrary.

Thus, the discriminatory fee cannot be defended on the ground that it recovers costs unique to interstate waste. Oregon instead has determined that interstate waste should be charged for costs that are common to both interstate and Oregon waste. That is the precise ground on which the Court held the Alabama tax at issue in *Chemical Waste Management* violative of the Commerce Clause. See 112 S. Ct. at 2015-2016 (observing that the health, environmental and financial risks advanced to justify the discriminatory fee "do not vary with the waste's State of origin in a way allowing foreign, but not local, waste to be burdened") (footnote omitted).

Second, the record establishes beyond any doubt that — contrary to Oregon's assertion — a large chunk of these costs is imposed only on interstate commerce; it is *not* borne by intrastate commerce through the State's general revenue measures. For example, nearly one-third of the fee, $0.72 per ton, allegedly covers possible environmental liability that the State might bear in the future in the event of a release of waste from a landfill. To the extent that risk of future liability is even a "cost" — given that the State has no current financial burden, may never have to pay anything at all, and is not required to save these revenues for use in the event they are needed[13] — it is a cost that intrastate

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outside of the county of origin. Or. Rev. Stat. § 459.305 (1991).

[13] Under federal law, the landfill operator and waste generators are responsible for these costs in the first instance. 42 U.S.C. § 9607. The State must pay only in the extremely unlikely event that all of these sources of funds were unavailable.

commerce does not bear either directly (through a fee) or indirectly (through other revenue measures) because the State does not allocate any portion of its general revenues to cover this "cost." R. 745 (report of State's economic expert). Similarly, the $0.20 per ton charge for lost disposal capacity is neither directly nor indirectly imposed on Oregon waste. *Ibid.*

The fact that more than one-third of the fee ($0.92 per ton) subjects interstate waste to costs that are not imposed in any manner on Oregon waste establishes beyond any doubt the unconstitutionality of this measure. The Oregon tax is in this regard identical to the Alabama tax invalidated in *Chemical Waste Management* because Oregon has not — and cannot — explain why it "targets *only* interstate * * * waste" (112 S. Ct. at 2014 (emphasis in original)) to meet its goal of cost recovery when Oregon waste imposes the same costs upon the State but is not required to pay for them.[14]

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[14] Oregon may argue that it is entitled to limit these charges to interstate waste. The State's justification for the charge for lost disposal capacity, for example, is that "[e]very ton of solid waste accepted from out-of-state uses disposal capacity which cannot be used for Oregon waste, and which therefore must ultimately be replaced." R. 681. But the assumption underlying that contention is that Oregon waste has some superior entitlement to Oregon disposal capacity and that interstate waste must therefore pay "compensation" for displacing Oregon waste. This Court squarely rejected that premise in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978), holding that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders."

The charge for potential environmental liability apparently rests on the assumption that out-of-state generators will not be available to pay for any cleanup costs the State might incur. But federal law makes out-of-state generators liable to the same extent

Third, 10 cents of the $0.58 charge for statewide waste reduction activities is designed to recover costs associated with programs to reduce waste generation *by Oregon generators*. R. 896 (statement of DEQ official). That plainly is not a cost imposed upon Oregon by the disposal of interstate waste.

Finally, more than one-quarter of the fee, $0.66 per ton, is designed to recapture state tax credits or other subsidies relating to transportation or disposal of solid waste such as, for example, credits for the cost of pollution control measures installed in constructing a landfill. Because Oregon waste is not subject to this charge, these credits and subsidies remain undisturbed to the extent that a landfill disposes of Oregon waste. If the landfill is used for disposal of interstate waste, however, these credits are proportionately reduced.

Imposition of that "recapture" charge constitutes an independent violation of the Commerce Clause. In *New Energy Co.*, this Court held that Ohio could not grant a tax credit for sales of Ohio-produced ethanol, but deny a credit for sales of ethanol produced in other States. By "explicitly depriv[ing] certain products of generally available beneficial tax treatment because they [were] made in certain other States," the Ohio law violated "the cardinal requirement of nondiscrimination." 486 U.S. at 274. Here, by denying a tax credit to Oregon landfills to the extent the landfill disposes of interstate waste, but granting credits to the extent the landfill is used for Oregon waste, Oregon is engaging in precisely the same prohibited conduct.

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as Oregon generators (see note 13, *supra*) and out-of-state generators certainly are no more unlikely to become insolvent than in-state generators. If some sort of "insurance fund" is justified, therefore, on the ground that generators might not be available to compensate the State for the clean-up costs, there is no basis for exempting Oregon generators from the obligation to contribute.

In sum, review of the record confirms that the Oregon tax clearly and unequivocally discriminates against interstate commerce in violation of the Commerce Clause.

CONCLUSION

The judgment of the Supreme Court of the State of Oregon should be reversed.

Respectfully submitted.

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